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Sanctioning Value: The Legal System, Hyper Power and the legitimization of MP3

Abstract

This paper offers an historical account of the contestation surrounding MP3 and its legitimization as a consumer choice option. We juxtapose our narrative against the Service Dominant-Logic literature (SD-L) which positions the consumer as the co-creator of value. In these debates issues of power and politics are downplayed. By contrast, we foreground the politicised processes that frame consumer choice options. Via a study of the legal disputes around MP3 and digital delivery services, we make a case that law courts provide the scaffolding for judgments of value in the market system. Contrary to proponents of SD-L, value is not only a function of co-production between company and customer. Nor do all consumption practices acquire sufficient legitimacy to enter into legally sanctioned value co-creation interactions. This is a function of the ‘hyper-power’ practiced by the legal community and related actors which constitute or deny value to product offerings. Value is not, therefore, necessarily phenomenologically determined by the ultimate consumer. Neither are they the sovereign individual of marketing lore. Their subjectivity is patterned by macro and meso actors and service provision is permitted when it is capable of enrolment within the circuits of capital accumulation.

Keywords: Foucault; Genealogy; Hyper-power; MP3; Service-Dominant Logic; Consumer Culture Theory.

Introduction

The promotion of digital music has been hugely successful. It contributes very large sums to corporate coffers. There are now over 450 online music stores with 41 million paying subscribers to streaming services worldwide (IFPI, 2015), whereas in the early 1990s, there were none. MP3 and its derivatives have proliferated, yet are only deemed legitimate consumer choice options if accessed via licensed services.

Consumer choice options are categories of goods or services that are classified and prioritised as preferred means of satisfying needs. These are typically privately owned and accessed through market exchange (Firat, 1987; Firat and Dholakia, 1977, 1982). Attached to these options are associated practices – ways of understanding, saying and doing (Schau et al., 2009) – that are legitimate when they conform to the rules and regulations set by the legislative apparatus, are consistent with dominant norms and values, and aligned to existing cognitive schemas (Humphreys, 2010b). In the case of MP3, these arrangements include having to pay and adhere to the conditions set by music retailers. These may entail the inability to copy, sell or re-gift them, with file sharing outside of legitimate distribution networks labeled as ‘a form of theft’ (see Denegri-Knott, 2004). These processes and discursive moves were not inevitable. And they can be challenged via historical excavation.

Until recently, attention to these kinds of processes has been minimal. This is a reflection of longstanding paradigmatic and epistemological commitments. For many years, marketing theory has grappled with the concept of the marketing system by taking a functionalist approach to make sense of how the various constitutive elements of these networks ensure the achievement of system objectives (e.g. Layton, 2007, 2009). One of the problems with

functionalism as a sociological approach is its orientation towards system maintenance, its lack of concerted attention to conflict and the implicit assumption that currently operating market and marketing systems should be stabilised and extended in the interest of the public good (Burrell and Morgan, 1979). These assumptions inflect recent debates on Service-Dominant Logic (S-D).

Work carried out under the rubric of S-D Logic has adopted a process-based, evolutionary orientation to frame its approach to value co-creation. Within this literature, the consumer is a co-creator of value working in conjunction with multiple actors (Chandler and Vargo, 2011; Edvardsson et al., 2011; Vargo and Lusch, 2004, 2008, 2015). While these groups often have markedly differential access to resources, knowledge and gatekeepers (Arnould, 2007; Brown, 2007), questions of power and politics in market organisation are typically downplayed. Instead, the world of exchange within S-D Logic is egalitarian, inclusive, ‘balanced’ (Karababa and Kjeldgaard, 2013) and ‘symmetric’ (Akaka et al., 2013, Chandler and Vargo, 2011; Lusch and Vargo, 2008; Vargo and Lusch, 2015) with mutual benefit the order of the day (Akaka and Vargo, 2015; Gummesson, 2008).

This view of co-creation as a harmonious process leading to positive outcomes for all does not sit comfortably with research that highlights the politics, conflictual relations and exploitation that permeate the market (e.g. Corvellec and Hultman, 2014; Cova and Dalli, 2009; Edvardsson et al., 2014; Laamanen and Skålén, 2015). While such works are rare, they do invite us to think more critically about the political constitution of value co-creation and the uneven distribution of power between state, companies and consumer. Nonetheless, even these studies tacitly assume that power is a possession of a dominant firm which seeks to

maintain key ideas and values that functionally animate the marketing context and its attendant co-creative practices (Edvardsson et al., 2011; Schau et al., 2009).

The problem here is that firm and consumer agency is enacted within boundaries set by field-defining ‘superordinate institutions’ (Humphreys, 2010a) and ‘supraorganizational’ influences (Edvardsson et al., 2014). This lacuna has recently been appreciated by S-D proponents in their reflections on service ecosystems (Akaka and Vargo, 2015; Vargo and Lusch, 2015) and ‘institutional logics’ (Edvardsson et al., 2014). They argue that we need to produce more realistic representations of the processes of value constitution that account for the multiple actors above and beyond the firm-consumer dyad. In particular, their attention has gravitated to the institutional level (Chandler and Vargo, 2011; Prior, forthcoming; Vargo and Lusch, 2015). They encourage us to explore how norms, rules and frameworks enable value production and marketplace activities. Attention to the socio-historic shaping of exchange relations, it is maintained, is an essential future direction for research (Akaka and Vargo, 2015; Vargo and Akaka, 2012).

At present, their focus has been conceptual (e.g. Akaka and Vargo, 2015; Chandler and Vargo, 2011; Vargo and Lusch, 2015). To further the type of critical enquiry we have in mind and situate exchange processes within the power relations that do permeate the marketplace (Kotler, 1972, 1986), we must explore the roles played by institutional actors in defining the conditions of possibility for value creation and exchange. Studying the institutional matrix that frames the marketplace is one of the ‘keys to understanding human systems and social activity’ (Vargo and Lusch, 2015: 18). Put otherwise, the marketing system we inhabit is the product of human agents and organisations that are embedded in the institutional frameworks that support capitalistic market structures (Chandler and Vargo, 2011; Giesler, 2008; Giesler

and Veresiu, 2014). One of the most prominent is the legal system whose legitimization function undergirds and reciprocally interacts with the market (Foucault, 2008), helping constitute marketing practice and enable consumer access to goods and services (Brei and Tadajewski, 2015; Giesler, 2008).

Vargo and Akaka (2012), Vargo and Lusch (2015) and Prior (forthcoming) do register that the legal system, legislatures and legislation are some of the most important conditions of possibility for the historical and on-going operation of the market. But their argument is underdeveloped. Vargo and Akaka (2015), for example, repeat the mantra of S-D Logic that value is phenomenologically determined by the consumer. However, there is an oscillation in this body of work. Vargo and colleagues seem to partly appreciate – at some level – the differential basis of power relations in society. It is not the individual or ultimate consumer who is solely responsible for value judgements. More accurately, they make value determinations on the basis of a range of options that have already been winnowed for their attention by institutions and social structures. Vargo et al implicitly register this when they stress that institutions are the ‘guiding forces of value determination’ (Vargo et al., 2015: 68).

Joining these narrative threads – that is, the importance ascribed to the legal community and differential power relations – leads us to theorise that this community of practice is one of ‘guiding forces’ in value constitution. It structures political-economic (Bakan, 2005; Foucault, 2008, 2015), organisational (Chandler and Vargo, 2011; Humphreys, 2010a; Kotler, 1986; Vargo and Lusch, 2015) and consumer practices (Askegaard and Linnet, 2011; Atik and Firat, 2013; Brei and Tadajewski, 2015; Giesler, 2008; Giesler and Veresiu, 2014). What we mean is that the legal system and the decisions made within law courts enable and constrain what are legitimate consumption options and consumer practices and thus objects for our

attention and engagement. This bedrock assumption clearly differentiates our work from traditions like S-D Logic which focus on the idea that value is only constituted within the market (Akaka and Vargo, 2015; Grönroos, 2012; Gummesson, 2008). We suggest that decisions about value are legitimated or de-legitimated before a consumer uses a product or service.

In other words, the legal system helps constitute or deny value to product offerings (Pietz, 1985). Our choices and agency are structured, patterned and delimited by actors who deny alternative regimes of marketplace (and non-marketplace) practice while affirming others. These decisions are often more consistent with the needs of the capitalist system, organisational profit objectives and the continued expansion of the status quo (Applbaum, 2009; Banerjee et al., 2011). Reflecting these ideas, in this paper we engage with issues of ontological politics and the legitimation of choice options and practices by imbricating the marketplace within the legal system. The latter helps frame industries in certain ways, thereby performing a major role in reaffirming the ‘hyper-power’ of capitalist exchange relations that impact upon the consumer (Foucault, 2015). We explore this topic via a genealogy of the development and politics manifested in the legal sphere relating to MP3 and digital music.

Focusing on the legal system (and attendant writings, opinions and scholarship intended to direct it) demarcates this study from prior research. Previous scholarship has touched upon the importance of the legal and regulatory environment, but only in passing. Humphreys (2010a, 2010b) charts shifts in the legal environment enabling the growth of the casino industry. Giesler (2008) makes succinct gestures to the relevance of studying the legal system and its influence on consumption choices, signalling the importance of these factors in relation to

music downloading. Offering a slightly different perspective, Denegri-Knott and Tadjewski (2010) provide a valuable – albeit incomplete – genealogical account of the influence of macro- and meso-level factors that defined the technological basis for MP3. They focused on government policy, important stakeholders (e.g. the recording industry, AT&T and the Fraunhofer Institute), their corporate cultures and the contributions of disciplinary specialisms (e.g. psychoacoustics and electrical engineering) to illuminate the contextual dynamics for the production of this technological artefact.

Our reference to the incomplete nature of their genealogy should not be taken as a wholesale criticism. By their nature, genealogies are partial. Foucault registered that additional studies are always necessary to flesh out the ‘polyhedron of intelligibility’ that enables us to make sense of the formation, sedimentation and extension of a discipline (e.g. Tadjewski, 2006, 2010b, 2011, 2012), mode of thought (e.g. Zwick and Bradshaw, forthcoming), conceptual category (e.g. Tadjewski, 2016) or object of analysis (e.g. Foucault, 2000). This is the generative motive for the present paper. We extend the analysis of Denegri-Knott and Tadjewski (2010) by articulating how MP3 was ‘ordered’ as a consumer choice option affixed to ‘Market Conservatism’. We expose the power relations permeating the decisions that *de-legitimated* alternative exchange regimes – a highly novel contribution to the academic literature (Humphreys, 2010a) – and *legitimated* conservative consumption practices. The latter was only enabled through the silencing of oppositional discourse. We explore how a major facet of this ‘marketplace drama’ (Giesler, 2008) was affirmed by the legal system, that is, how the social field for music consumption was enrolled within the orbit of possessive individualism, Market Conservatism and the circuits of capital.

The idea of historical research as a tool for ‘ontological denaturalisation’ (Fournier and Grey, 2000), that is, with rethinking why certain exchange relationships and consumption practices are legitimate while others are denied sanction is based upon the theoretical, conceptual, epistemological and methodological resources bequeathed by Michel Foucault. Foucault’s ideas have been used to draw our attention to the role of power in producing and denying certain ways of thinking about markets, marketing, marketing theory and consumer agency (e.g. Ahmadi, forthcoming; Earley, 2015; Falconer Al-Hindi and Staddon, 1997; Giesler and Veresiu, 2014; Skalen et al., 2006; Tadajewski, 2006, 2011). These accounts often articulate how the way we think, act and engage with the world is permeated with power relations that operate at the macro-, meso- and micro-levels (Giesler, 2008; Tadajewski et al., 2014; Zwick and Bradshaw, forthcoming), subtly channeling institutional activities and consumer action in certain directions and not others at the same time as they leave room for resistance (Ahmadi, forthcoming). We will engage with key ideas, concepts and methodological ‘precautions’ offered by Foucault below, focusing specifically on the concept of ‘hyper-power’ (Foucault, 2015). Our empirical focus, combined with the analytic sensitivity offered by Foucault’s recent work, thereby deepens contemporary debates regarding value creation, affirmation and de-legitimation in multiple ways.

The structure of the manuscript is as follows. First, we explain our historical and theoretical approach. We then identify how MP3 as a consumer choice option emerged. This is achieved by focusing on historical contingency, discursive formation and institutional sedimentation. For analytic purchase – an essential feature given the tendency of genealogical studies to run to considerable length (e.g. Tadajewski, 2006, 2016) – we have focused our analysis on the 1999-2001 A&M Records v. Napster Inc. case. This was an important case that has not been studied in the level of detail we undertake in this paper. It merits attention as it was

foundational in the process of the legitimation of MP3 (Denegri-Knott, 2004; Giesler, 2008).

We explicate the dynamics among the various stakeholders and chart the effects of ‘hyper-power’ in this legal case and market. We conclude with a discussion of our findings and indicate directions for future research.

Moving Towards Epistemology and Methodology

A criticism of marketing theory that still carries weight today is that we know comparatively little about the emergence of consumer choice options. We understand a great deal about consumer decision-making, but far less about the processes that normalise methods of need satisfaction (Brei and Tadajewski, 2015; Firat, 1987; Humphreys, 2010a). Obviously, our ability to make a choice is not simply an individual decision (Alderson, 1958). Choices are the outcome of complex socio-historical processes that can be traced at multiple levels (e.g. Chandler and Vargo, 2011; Giesler, 2008).

Recently scholars have made a plea for registering that our choices are deeply influenced by wider contexts (e.g. Askegaard and Linnet, 2011; Chandler and Vargo, 2011; Vargo et al., 2015). On rare occasions, reference is made to the preformatting of choice by our respective institutions and laws (Firat, 1987; Humphreys, 2010a). This reorientation of marketing and consumer research cuts to the core of contemporary debates. In emphatic terms, Chandler and Vargo aver that ‘How exchange is framed by context is a fundamental aspect in the study of markets and value co-creation that requires further exploration’ (2011: 45).

Our position departs from the epistemology of S-D Logic and connects with the emerging critical literature referenced above. Taking a cue from this material, the marketplace is not a domain of equivalent power relations (Arnould, 2014; Banerjee et al., 2011; Foucault, 2015).

It is decidedly unequal and asymmetric (Applbaum, 2009; Foucault, 2008; Geiger et al., 2012; Giesler, 2008; Kotler, 1972, 1986). This is made very apparent in the intellectual bedrock for studies on ‘megamarketing’ (e.g. Kotler, 1986). Kotler (1972) has long been aware of the unequal nature of the marketplace, references the role for coercion in exchange relations, the prominence of ‘vested interests’ and the usefulness of threats to secure desired behaviours (e.g. Kotler, 1972, 1986). Connected to this, history is often ‘violent’ and ‘bloody’ (Foucault, 1979: 134). And our inherited political, economic and legal systems as well as the marketplace reflect these conflictual tropes (e.g. Ahrne et al., 2015; Edvardsson et al., 2014). These analytic points have been underplayed to date (Giesler et al., 2012). We emphasise them.

In the opinion of Foucault, scholars might look to particular domains if they want to see the power-laden tapestry of human and institutional activity most vividly. His general point is that we need to look to areas where there are structurally sedimented institutions, forms of knowledge, disciplinary specialisms and actors who interact with groups that seek to transform the order of discourse (Foucault, 1979, 2015). He usually singles out groups who are part of the status quo or operating on its margins. They are typically permitted to differentiate between normal and abnormal practice (e.g. Foucault, 1977/1991: 248-249). Psychiatrists figure prominently in his ruminations, as do judges. They all promote ‘normalizing’ discourses (e.g. Foucault, 1977/1991: 296-297; 2006: 102, 133, 202; 2015: 240-241).

In the case of MP3, Foucault’s arguments direct our attention to the ways in which historical developments contribute to our current experiences, engagements and marketplace participation (e.g. Foucault, 2008). His archaeological and genealogical studies are useful in

that they illuminate how particular theoretical traditions, concepts, practices and institutions have emerged. He connects these discussions to external factors that shape a variety of domains of discourse, often referencing important political, legal, economic, social processes and events that help cement particular realities. This descriptive facet of his work is called his archaeological approach. Subject to criticism for failing to illuminate the role of power led him to engage with ‘the way in which relations of power give rise to discursive practices’ in later work (Foucault, 2015: 93). This was the genealogical element of his analysis, with the latter label subsuming archaeology. It is the approach we take in this paper.

These methodological ‘precautions’ led us to explore the interactions between those who seek to reaffirm traditional market exchange relations and those seeking to produce, promote and extend alternative visions of market and non-market systems using genealogical analysis as our methodological strategy. This focus on power relations keys into an important theme underwriting Foucault’s approach to historical analysis. He posits that history is a battleground: ‘The historic force which propels and determines us is in fact warlike...It is...understandable and should be analysed down to the last detail; but analysed in terms of the understanding of battles, struggles and tactics’ (Foucault, 1979: 134).

Just because power is not something that is possessed – Foucault asserts that power can only be practiced – does not entail that some groups, classes, or institutionally sanctioned professionals do not have the potential to exert a greater level of power than others (Foucault, 2015). This nuance is neglected in research invoking Foucault. Gestures are sometimes made to the linkage between power and resistance. What is not appreciated is that certain groups can mobilise ‘hyper-power’ (Foucault, 2015). Hyper-power is a ‘multiplied, accumulated power’ (Foucault, 2015: 219). It is a vision of power relations that stresses the mobility and

plurality of relations of force – thus working against Marxist accounts – yet still registers the inequitable distribution of influence.

While it is the case that one group (like the bourgeoisie) cannot inflict its vision on the rest of a population without any resistance, social privilege can result in power effects that are ramified and cohesive (cf. Geiger et al., 2012; Humphreys, 2010a). Arguably, this is likely to be the case when power relations are mobilised by a group with social sanction, legislative power and the weight of historical precedent on their side. As Foucault explains:

‘The power relationship does not conform to the monotonous and definitive schema of oppression. Of course, in this kind of general war through which power is exercised, there is a social class that occupies a privileged position and may thereby impose its strategy, carry off a certain number of victories, accumulate them, and obtain the advantage of an effect of hyper-power.’

(Foucault, 2015: 228)

Given the prominence of these institutions and actors, there are often records of these strategic interventions in the order of discourse that capture the contestation that took place. We are not looking for things that are not or never said in relation to an order of discourse. This is a methodological idea that is bereft of sense (e.g. Deleuze, 1999: 57; Foucault, 1976/1998: 11, 2015: 166). Foucault’s point is that we should look at what is said, by whom, for what purpose and unravel why it secures discursive and analytic purchase.

Relatedly we must be attentive to the elision of statements, denials of validity, challenges to acceptability or appropriateness within an order of discourse (Foucault, 1979, 2015). This

provides us with insight into the ‘conditions of acceptability’ (Foucault, 2015). Importantly, these movements and power plays are ‘transparent to analysis and...can be discovered if we study the strategies of power. Where sociologists see only the silent or unconscious system of rules, where epistemologists see only poorly controlled ideological effects, I think it is perfectly possible to see perfectly calculated, controlled strategies of power’ (Foucault, 2015: 236).

Methodologically, therefore, this encourages us to pursue close readings of prominent case studies, analytic arguments, legal judgements, as well as explore marginalised literature, works and themes that have been written out of the canon. To destabilise our current understanding of MP3, we engage with texts written between 1993 and 1999 endorsing free digital music. We read this material in conjunction with content derived from software engineering and law, where digital music is classified as a common (not private, commercial) good amenable to infinite sharing. This archive consists of 15 manuscripts written by law theorists and 22 authored by software engineers.

In mapping the transformation and legitimisation of digital music consumption, we unravel disputes between three competing discourses (Digital Communitarianism, Digital Libertarianism and Market Conservatism) that were mobilised during the 1999-2001 A&M v Napster Inc. case. Engaging with these sources will enable us to narrate how a plurality of choices are winnowed to a consumer choice option. This focus on a legal case is consistent with Foucault’s engagement with court evidence. He used these to illuminate competing discourses. Our empirics comprises 90 documents amounting to 1444 pages of text. This includes declarations from interested parties, court rulings, summaries, notices,

memorandums, expert reports, amici briefs in support of Napster or A&M Records and trial transcripts of the proceedings.

The analysis involved weighing the currency of different discourses and the authorities representing key institutions (i.e. who was empowered to speak, for what purpose and with what result). Specifically we traced attempts to conceptualise and manage emergent objects, practices and subjects. These exercises enabled us to see the effects of ‘hyper-power’ and the fixing of MP3 as a digital consumer choice option and their corresponding consumption practices as legitimate in the eyes of the law.

Where previous scholarship has been attentive to the formation of choice options as an evolutionary process (Chandler and Vargo, 2011; Chaney et al., forthcoming) we conceptualise them as resulting from the ramifications of ‘hyper-power’ (Foucault, 2015), discontinuity and continuity (Foucault, 1979). We widen the scope of actors embroiled in the production and affirmation of market systems beyond the consumer-producer dyad to include a multiplicity of actors – a methodological move consistent with Foucault’s work and the recommendations of recent publications (e.g. Chaney et al., forthcoming; Geiger et al., 2012; Giesler, 2008; Humphreys, 2010a).

COMPETING MARKET AND NON-MARKET SYSTEMS FOR DIGITAL MUSIC

MP3 as a Common Good

The emergence of MP3 sharing in the mid-1990s was disruptive and discontinuous. Nor was it consistent with the conditions of acceptability that circulate in capitalist marketplaces. As appreciated by Giesler (2008), the hacker positioning of MP3s as common goods challenged

the legitimacy of traditional consumption practices for music. Historical contingencies exacerbated this movement into a liminal twilight. Most notably these included the lack of regulation for Internet start-ups and government initiatives to wire schools and university campuses. Equally important was the discursive work being undertaken in the fields of law, cyber-culture and software engineering.

The first MP3s were consumer made and the appropriation of compression technology by hackers provided one of the conditions of possibility for the cultural practices that boosted the spread of MP3, especially among American students. These enjoyed faster networks than their European cousins that they employed to share music. Without the exponential growth of the Internet and the development of computer processing power to run music files, Internet Relay Chat to facilitate sharing, the advent of technology like MP3 players and online skins to play MP3 files, MP3 technology would never have been recognised as a thing of value. The factors that enabled the diffusion of this technology were, therefore, manifold and interlocking.

Even though free sharing of MP3s was prevalent in the 1990s, there were attempts to enrol them within commercial market structures by e.Music, MP3.com, Ritmoteca and Sony Music among others. However, it was only with the popularisation of Napster beginning in August 1999 that an attempt to create a competing market system for digital music took hold. Napster's Peer-to-Peer (P2P) file sharing architecture facilitated the transmission of MP3s by making the files available to other users. At its height, the service had over 75 million users (i.e. July, 2001) sharing approximately 10,000 music files per second (Brief of Plaintiff, 2000). By this time users, particularly those located in North America, were conversant with a sharing logic that permeated most popular Internet applications (Rheingold, 1993). It is

within this context that file sharing was articulated as an expression of free sharing among Napster's users.

These articulations have their seeds in essays posted online between 1993 and 1999 by Ram Samudrala from the Free Music Movement. His posts present a justification for digital music sharing as an alternative non-market system of music production and consumption.

Samudrala starts by defining his philosophy as 'an anarchistic grassroots, but high-tech system of spreading music: the idea that creating, copying, and distributing music must be as unrestricted as breathing air'. He clarifies that 'you have the freedom to make a copy of a CD I've created, the freedom to download sound files of songs I've created from my server on the Internet, the freedom to cover or improve upon a song I've written'.

These ideas are refractions of a Digital Communitarian discourse that surfaced in the early 1990s in the writings of software engineer and free software advocate, Richard Stallman, legal analysts like Jochai Benkler and Lawrence Lessig and cultural commentators like Howard Rheingold. Digital Communitarianism proclaimed the Internet as a new commons, a collectively produced and shared space (Rheingold, 1993; Benkler, 1999; Lessig, 1999a, 1999b). In the commons, it was the community member and not the consumer, who was engaged in coproducing a peer-based economy. The field of law reverberated with references to the Internet as a commons. Lessig (1999b: 3), for example, maintained that:

'The Internet is a commons: the space that anyone can enter, and take what she finds without the permission of a librarian, or a promise to pay. The net is built on a commons – the code of the world wide web, html, is a computer language that lays

itself open for anyone to see – to see, and to steal, and to use as one wants...It's out there for the taking; and what you take leaves as much for me as there was before.'

He uses the terminology of the commons to link an open Internet architecture to a vibrant public domain. This allows him to transverse issues of free expression, access to content and the preservation of the public domain. With Benkler and Litman, Lessig enunciates a normative position to defend an open information structure for digital goods. Their point is profoundly antithetical to capitalist conditions of acceptability. Read in conjunction, they believe that digital goods should be freely accessed. Hence their invocation of genealogical precedent in the form of the 'commons' and the threats posed by capitalist enclosure (i.e. the potential for the emergence of new forms of 'illegalism' tied to behavioural practices ultimately deemed deviant in relation to incumbent legal and social mores (Foucault, 2015)).

For Lessig, there should be a strong counterweight to private property (1999a, 1999c, 1999d). In sketching out an alternative vision for the ordering of digital goods as common goods, he is well aware that the status quo, that is, the legal system and current political-economic thinking will work against perspectives inconsistent with the conditions of acceptability for statements about property rights. Here, the weight of history can potentially cleave space in current formations of discourse in the hope of fomenting alternative perspectives that would ordinarily find it difficult to negotiate the assumption bases in play. As Lessig explains,

'We need a way to resist this. We need a way to show just why this obsession with property is not the property our framers had in mind. We need a way to show that it will recreate the closed society. We need a way to show that IP [Intellectual Property] has always been understood to mean balance between incentives and the commons... We

need some way to get people to see that the resistance to this propertization is not communism' (Lessig, 1999c: 14).

These justifications for a non-market system drew from deontological ethics and utilitarian ideals. Samudrala invokes this grounding: 'Limiting your creativity to specific audiences, especially...[for] monetary reasons, is shirking existential responsibility and destructive to society as a whole'. Such lofty ideals had previously been popularised by Richard Stallman (whom Samudrala cites). Stallman was a staunch advocate of the right to access, change and freely distribute computer code. His position diverges significantly from extant copyright law: 'the desire to be rewarded for one's creativity does not justify depriving the world in general of all or part of that creativity...the Golden Rule requires that if I like a program I must share it with other people who like it' (Stallman, 1985: 33).

The logic of these observers was beguiling. Morally, everyone should be able to experience and contribute to the production of a digital commons. The benefit(s) for the community should be elevated above the rights of individuals. An open and transparent system of cultural proliferation would enhance engagement with the content and strengthen communal ties (Rheingold, 1993; Stallman, 2002). In stronger terms, failing to contribute to the community causes 'psychosocial harm' (Stallman, 1992). It is 'antisocial and anti-ethical' (Stallman, 2002: 8). These discursive narratives weaved throughout user communities, with the Internet savvy justifying their activities by invoking terms such as community, gifts and sharing (e.g. Giesler and Pohlmann, 2003a, 2003b; Giesler, 2006, 2008).

Digital Libertarianism and MP3 as a Promotional Hook

File sharing was not simply a function of the ethos articulated and enacted on the web. It was enabled by the zeal of high-tech entrepreneurs who circulated the applications needed to create and share MP3s. So, we are not within the terrain of ‘illegalism’ yet (i.e. where community needs and desires are eclipsed in the face of a corporate pursuit of profit which is affirmed through legal sanction). Rather, this is a familiar terrain within the development of capitalism. The political-economic-legal structure of capitalism has historically had a fairly profound tolerance for activities that enable the expansion of the marketplace (Foucault, 2015), especially those that help it operate efficiently prior to its sedimentation in ways conducive to corporate profit objectives – *the* objective that drives business in the American legal system (e.g. Bakan, 2005).

Online success relied on attracting enough eyeballs to constitute a website as a tradable commodity. Venture capitalists were eager to invest in sites with appropriate levels of ‘share of mind’ (e.g. *New York Times*, 2000; Raymond, 1998, 1999; Spector, 2000). This investment influx coincided with a period of financial prosperity in the US. Low interest rates eased access to capital and fostered a flurry of speculation on start-ups like Napster who had only vague ideas about how to monetize their popularity.

The need for rapid growth led to a translation in the concept of ‘free’. As we have shown, for Digital Communitarianism ‘free’ meant freedom of expression and equal access to a vibrant public sphere and its production. However, in the emerging market system around MP3, ‘free’ was used as a promotional hook. Napster, in particular, used MP3s as hooks to attract consumers who they hoped to convert into paying customers (Dinger, 1998). By converting users, Napster wanted to monetize their popularity through the sale of ‘subscriptions, product

sales, sale of demographic information, and ultimately, [the] sale of the company' (Brief of Plaintiffs, 2000: 13).

To legitimize this commercial moment, moral traction was provided by a Digital Libertarian discourse that proselytized the rights of the individual citizen to exploit the richness of the digital terrain without government intervention. Digital Libertarianism fused technological determinism with free market, liberal ideals, celebrating the Internet as a regulation-free zone. Market mechanisms were heralded as the vehicle to ensure individual freedom and societal wellbeing. These discursive threads are prominent in the writings of John Perry Barlow, founder of the Electronic Freedom Foundation (Perry Barlow, 1996) and Eric S. Raymond (1998, 1999, 2000) from the Open Source Movement. They were often featured in *Wired* magazine.

Raymond's essays allow us to trace how classical liberal ideas were used to substantiate defining code as private property. He argues that private property is attributable to the labourer who works and improves it; accepting this, the same logic should define the relationship between the creator of code and her labour (1998, 1999, 2000). Private property in this axiology is an incentive to work. As such, Napster's developers were morally entitled to profit from their invention. Moreover, Digital Libertarianism's objection to government intervention was grounded on the belief that the Internet was 'the freest of spaces' and governed only by 'enlightened self-interest' (Barlow, 1994, 1996). Internet start-ups like Napster could use digital goods, like MP3s, as promotional hooks to build the critical mass needed because 'unlike physical goods where there was a direct correlation between scarcity and value...Most soft goods increase in value as they become more common' so 'it may often

be the case that the best thing you can do to raise the demand for your product is to give it away' (Barlow, 1996).

Some tentative conclusions can be made regarding free sharing on the web. Initially MP3 was not classified as a terminal item of consumption. It was a link in a process of sharing, proliferation and promotion. To legitimate appropriate use and symbolic values, actors invoked a Digital Communitarian discourse that regarded MP3s as common goods. Digital music consumption practices *could*, therefore, have been defined by the parameters of commons-based or collaborative production. These practices *could* have been defined as normal, but they were enfolded in contestation that sought to rethink these emerging discourses in ways congruent with capitalist and free market economics. This legally and economically framed challenge led to the patterning of MP3 as a legitimate consumer choice option, as we shall see.

MP3 as a Legitimate Consumer Choice Option

Securing consensus on the definition of MP3 consumption practices was not simple. It involved the collision of competing discourses. These struggles come to the fore during the 1999-2001 A&M Records v. Napster Inc. case. In the next section we identify discursive transformations through which exchange based MP3 consumption gained legitimation within the legal structure. We draw attention to *derivations* in discourse and positional *mutations* in market actors, objects and practices in the attempts to accommodate crystallising objects and behaviours.

The Napster Court Case: Discursive Contestations

On December 6, 1999, an anti-downloading coalition filed suit against Napster on grounds of vicarious and contributory infringement and unfair competition in the Northern District of California. By May 24, 2000, songwriter and music producers Jerry Leiber, Mike Stoller and the Frank Music Corporation joined forces with the first claimants to shut down the service. This was challenged by Napster's defence to the Ninth Court of Appeals, but the judges presiding were in agreement that file sharing was illicit under copyright law. Napster was forced to remove problematic material and it ceased operations in 2001. In court documents summarising the District and Appeals court proceedings, one of the issues to be defined was 'the boundary between sharing and theft, personal use and unauthorized worldwide distribution of copyrighted music and sound recordings' (Opinion, 2000: 1). As the files submitted were scrutinised and the final deliberations read, what was disputed was Napster's right to provide a service, not the legitimacy of MP3 as a common good or free sharing as a consumption practice. Such possibilities were quickly buried.

Any submitted declaration that sought legitimacy based on Digital Communitarian arguments was either not invoked or dismissed on technical grounds. Lawrence Lessig's (2000) defence of MP3 as a common good and free sharing as a legitimate practice was dismissed because his report 'merely offers a combination of legal opinion and editorial comment on Internet policy' (Memorandum and Order of Re Admissibility of Expert Reports, 2000: 9). This was a first volley in attempts to define normal consumption of MP3 in terms congruent with Market Conservatism. It was not the last.

Another legal report produced by a consortium of 18 copyright professors, including Jessica Litman (Amicus Curiae of Copyright Professors, 2000), that objected to the criminalisation

of legitimate practices like sharing and copying was not referenced in final rulings. Instead, discussion centred on five market reports. The latter were meant to support or dispute claims that Napster was a deleterious influence on legitimate consumption of paid-for music. Much of the ensuing discursive struggles dealt with Napster's right to profit from its innovative software. These juxtaposed Digital Libertarian and Market Conservative discourses. After all, Napster and their amici (e.g. America Online, Amazon, Yahoo!, Consumer Electronics and the Computer and Communications Industry Association) were only present to defend Napster's P2P architecture. Napster was defined as a neutral technology (albeit defined in terms that were remarkably consistent with the conditions of acceptability), with the amici calling the curbing of its technology unwarranted and capable of producing a 'chilling effect in the development of the new medium and new technologies' (Ad Hoc Copyright Coalition, 2000: 8).

The recording industry and judges alike sought to understand MP3 through the prism of established formats, most notably the CD. This tied an emerging process of digital proliferation into the circuits of capital and the existing rule structure applicable to copyright music (i.e. rendering MP3 in ways consistent with the conditions of acceptability). Here we see 'hyper-power' in action. Established industry players, supported by the weight of the legal community and precedent, examined a discontinuous innovation through capitalist convention and enrolled the services of experts to define a new technology in a manner consistent with a capitalistic and legal status quo.

To produce a chain of equivalence, the expertise of Dennis Drake, a sound engineer specialising in digital recordings, was used. He concluded that: 'the compared downloads are identical in content and nature to the respective sound recordings contained in the

commercially released form and are, in fact, duplications of the master recordings’ (Declaration Dennis M. Drake, 2000: 4). Once conceptualised through a capitalist framework, forms of knowledge operating over copyrighted music were extended to MP3s. They were not copies made by agentic consumers creating value that enriched the public domain as claimed by Digital Communitarianism, but corporate assets. File sharing was thereby illegitimate since users ‘had not been given permission for the file to be distributed on the Napster system’ (Declaration Charles J. Hausman, 2000: 2). Nor was this form of distribution commensurate with copying music for playback and personal sharing. This particular claim to truth trumped efforts to classify MP3s as legitimate promotional hooks. In documents submitted by Napster’s defence team, the use of MP3s for marketing purposes is presented as reasonable. They positioned MP3 as a poor quality sample. It was not a terminal consumption item, like a CD, in this legal parry. The sharing of MP3 was, therefore, akin to ‘visiting a listening station or borrowing a CD from a friend, to decide whether to purchase’ (Opposition, 2000: 13). In addition, their use as samples enhanced the consumption of music as a choice option because there is ‘clear evidence that sampling on Napster increases, rather than decreases, the market for that work’ (Opposition, 2000: 13). To buttress this position Napster’s defence included comments from The Offspring’s manager, and the rapper, Chuck D, who claimed that free MP3s allowed them to ‘reach fans directly’ (Declaration Chuck D, 2000; Declaration The Offspring, 2000). Official documents included references to many bands who used Napster to ‘promote themselves’, thereby ‘encouraging distribution of their work among a wide audience’ and ‘obtaining unprecedented exposure at a minimal cost’ (Opposition, 2000: 11).

In summary, a Market Conservative discourse established MP3 on a plane of equivalence to CD recordings that belonged to a copyright owner. Discursive contestation resulted in the

classification of MP3 as a consumer choice option and free sharing practices were declared illegitimate since they violated a significant condition of acceptability, namely the music industry's pursuit of profit (among other factors). Even so, while a very specific consumption practice for MP3s was defined by a Market Conservative discourse, this discourse was not immune to internal change. It underwent a series of mutations. These reduced the range of normative experiences people could have with MP3 in comparison to other music formats.

Mutations

Once MP3s were classified as consumer choice options when accessed legitimately via market exchange, file sharing became an act of theft. If 'putting a CD in their pocket and walking out without paying' was an illegal act, then so was MP3 sharing (Opinion, 2000: 3). The legitimacy of such classifications is better understood within a broader context of individual authorship (Giesler, 2008). Legitimation tactics included reference to 'depriving the recording industry's control over their property and compensation' to 'harming musicians, producers, unions and other legitimate sellers of music, both traditional and [on] the Internet' (Brief of Plaintiffs, 2000: 5).

What we see here is a Market Conservative discourse connected to possessive individualism, endorsing the privatisation of music as something that belongs to authors and merchants of music, and who are deserving of remuneration. Those who were permitted to speak about the economic damage caused by alternative distribution visions and able to underline the illegitimacy of free MP3s included Charles Robbins, a small shop owner catering to Syracuse University students, Mike Stoller, a composer and songwriter, Michael Dreese, co-owner of a music store chain, and representatives from the US Copyright Office. Stoller (2000: 2) complained how 'each time anonymous users of Napster swap a song [he has] composed, he

is deprived of the royalty...that work should have earned’, blaming Napster for ‘jeopardizing the future for music if it gets away with its thievery’.

MP3s traded through Napster were subsequently classified as ‘pirated copies’ and file sharing categorised as an illegitimate practice (Opinion, 2000). Sharing threatened the standing of existing practices of music consumption and was literally a condition of possibility for the emergence of a non-capitalist distribution regime. It negated the opportunity for capitalist market structures to replicate themselves into the future, jeopardising revenue streams and corporate financial accumulation. This is not something that agencies capable of using hyper-power would permit to pass without considerable challenge. And in the Plaintiff’s brief (2000: 14-15) it was argued:

‘The district court found that the defendant has contributed to a new attitude that digitally-downloaded songs ought to be free – an attitude that creates formidable hurdles for the establishment of a commercial downloading market. The evidence shows that perhaps the greatest danger posed by Napster...is that consumers are beginning to consider free music to be an entitlement.’

Other court documents echoed these views. Hyper-power is being performed: ‘Once consumers become accustomed to obtaining something [for] free, they resist paying for it...if the perception of music as a free good becomes pervasive it may be difficult to reverse’ (Transcript of Proceedings, 2000: 52). Law courts, in other words, provide the scaffolding for judgments of value in the market system. Value is not – as Vargo and Lusch (2015) and Chandler and Vargo (2011) assert – only a function of co-production between service provider, customer or the amorphous mass of a service ecosystem (cf. Giesler et al., 2012).

This is not to suggest attributions of value are simple and straightforward. Given the disruptive nature of MP3 and P2P, it was not easy to enrol these objects and practices within the circuits of legal judgment and capital accumulation. This is apparent in Judge Marilyn Hall Patel's final ruling: 'the court finds that although downloading and uploading MP3s is not a paradigmatic commercial activity, it is not also typical of...personal use in the traditional sense. It may be what makes this case difficult...is that it is hard sometimes to make [a] neat fit' (Transcript of Proceedings, 2000: 73). Mutations took place in terms of rights of ownership or fair use associated with legitimate music consumption practices. Whereas existing music consumption practices included copying, sharing, modifying, bequeathing and re-selling of music, these rules metamorphosed to deny them with respect to digital music consumption. Judges asserted that unlike copying music for friends, the 'vast scale of Napster' use is anonymous'. As such, the 'court finds that downloading and uploading MP3 music files with the assistance of Napster are not private uses' since users were getting 'something for free that they would ordinarily have to buy' (Opinion, 2001: 5).

Sharing thus mutated into 'distribution' and 'reproduction'; from sharing with friends to provisioning other people unknown to the user. This modified the framing of the activity from private consumption to public distribution. The Court of Appeals thereby defined the activities of Napster's users as breaching the copyright holder's rights of 'reproduction when they upload a file' and reproduction rights 'when they download files' (Opinion, 2001: 25). This transmutation is of considerable importance. This is highlighted when we refer back to the classical liberal legal discourse that justified private property. Consumption, as a transformative activity (i.e. in copying, sharing, gifting and reselling), is *no longer* a bundle of activities acknowledged as involving legitimate labour or expression which co-create

value. This differentiates MP3s from other music formats, where consumers can freely gift and re-sell their music. Relative to digital consumption, there have also been mutations in the positions that could be occupied by consumers relative to copyright owners. Previously, the former were referenced as rightful owners able to manage, sell, gift, bequeath or abandon their product. With MP3s, these rules are only applicable to creators and copyright owners. Consumer agency is restricted and deviations from acceptable practice would lead to their actions being equated with thievery or piracy.

The ease with which a Market Conservative discourse was mobilised is testament to the hyper-power derived from legally sanctioned legitimacy. With the normalisation of a discourse that made file sharing a deviant act, the legislative apparatus enabled the transformation of the ‘pirate’ into a paying customer. Strategies to re-format the subjectivity of music users into paying customers wove a tight web of control to measure, monitor and expose file-sharers. Notable in this regard is the enforcement of new legislation accompanied by fines, threats of incarceration, educational campaigns and legal services offering music that feels free. These tactics work at varying levels from punitive mechanisms through to modifying the moral fibre of the individual (see Denegri-Knott, 2004, Giesler, 2008). The objective is to encourage repentance and restrict consumption. Consumers are given the ‘choice’ of supporting online retailers like the new legal Napster or corporate behemoths like iTunes and Walmart. It is not a coincidence that there have been numerous efforts to ‘educate’ file-sharers and the wider public. In a diverse range of official documents (IFPI, 2015), PR campaigns (e.g. ‘Who Really Cares about Illegal Downloading’, 2002-2006) and websites targeting school children, the moral rights of music creators and others servicing the recording industry to be financially rewarded for their efforts are accentuated as legitimisation for delimiting a previously largely unregulated activity (cf. Edvardsson et al., 2014).

Discussion

This paper makes a number of contributions. We demonstrated how complex, power-infused processes leading to the production of discourses animating the legitimation of consumer choice options and associated consumption practices could be brought to the fore. This was achieved by accounting for the conditions of possibility and acceptability for MP3. We subsequently examined the interweaved discursive struggles through which legitimate practices – ways of understanding goods and ways of accessing, using, modifying, exchanging and divesting them – are established in a court of law. These were linked to a variety of social discourses that constituted the bases for the conditions of acceptability for the formation and dissemination of new discursive inflections.

We showed how institutional agents – including the recording industry – who sought to classify MP3s as a consumer choice option were legislatively attributed with more weight than competing discourses. Commentaries proffered by legal scholars and informed observers aligned to Digital Communitarianism which had the potential to disrupt the efficiency of the market were denied any credibility in the ‘games of truth’ operative around MP3 (Foucault, 1984).

Our legal focus was a departure from existing work within mainstream marketing research (e.g. Chandler and Vargo, 2011; Vargo and Akaka, 2012; Vargo and Lusch, 2015). In this case, we engaged with the legal community and stressed their role in constituting value in market systems. Not all collectively enacted practices, even those that are experienced as beneficial by consumers, such as P2P file sharing (cf. Giesler, 2006), acquire sufficient legitimacy to enter value co-creation interactions. Once practices are positioned within the

terrain of illegality, as we have shown here, they are denied any legal status as elements in value co-creation.

Our contrast with Consumer Culture Theoretics is equally marked (e.g. Arsel and Bean, 2013; Holt, 1998; Schau et al., 2009). Practices documented by Schau et al. (2009) like looking after cars or attending concerts are already defined as legitimate. In this paper, we did not want *a priori* to accept the status of extant consumption practices as legitimate. Our Foucauldian intent was to expose the discursive and legal processes that were the conditions of possibility and conditions of acceptability for a consumption practice. While there are CCT related studies that explore the interplay between the regulatory environment and marketing practice, their attention was devoted to general processes of legitimation (e.g. Brei and Tadjewski, 2015; Humphreys, 2010a). They did not focus on how the legal community performed a major role in *de-legitimizing* an alternative frame for conceptualising consumption practice (cf. Giesler, 2008; Humphreys, 2010a). This makes our paper a novel contribution to the literature, developing both S-D Logic and CCT research in a socio-legal direction that has not featured significantly in previous studies.

We should wind up this analysis by recalling Foucault's (2015) injunctions about the relationships between capitalism, the legal system, market system(s) and power effects. In the case of MP3, they have been analytically positioned within the circuits of the legal system. This institutional arrangement engages in 'ceaseless reciprocity' with the market system (Foucault, 2008: 164). On the basis of our genealogy, we can say that our socio-legal system, capitalistic exchange relations and the subject positions available to consumers are influenced by a conjunction of prominent actors who are shaped by and help shape the legal system

(Foucault, 2008, 2015). The processes involved are complex and need to be studied on a case by case basis.

What we do not wish to imply is that we have documented an instance of repressive power whereby people have unwittingly been forced to participate in the exchange relationships being articulated. This distinguishes our research from the extant literature that has a tendency to outline repressive views of power relations in this industry and product context (e.g. Giesler, 2008: 745, 749). Buying MP3s and using them in the manner legitimated by our legal system and the framing provided by Market Conservatism does provide a different point of engagement with MP3 for some people. Obviously, a considerable proportion of individuals continue to use MP3s and download them illegally (Denegri-Knott, 2004, Giesler, 2008). For many, though, the prism of Market Conservatism is the only way their exchange relationship has ever been framed. It is a norm and these exert power effects in the marketplace (Geiger et al., 2012). Among others, they delimit decision-making (Ahrne et al., 2015). But we cannot deny the pleasure and value that many people gain from their participation with online marketplaces that retail MP3s and facilitate easy and secure access to the vast musical resources this world can provide (Giesler, 2008).

This is why ‘hyper-power’ can be insidious (Foucault, 2015): it discounts other options, other ways of framing the world (Foucault, 2008), whilst being extremely pleasurable (Foucault, 1979). This discounting effect takes place – in the main – before the consumer registers the funnelling process that channels their consumption options. Furthermore, the incorporation of MP3 within the circuits of copyright law and capital flows was never framed in repressive terms. Denials of access via certain distribution routes were met with counterpoint arguments

that stressed consumer benefit for the foreseeable future. This is not a power that simply represses. It ‘produces things, it produces pleasure’ (Foucault, 1979: 137).

The above point is not intended to be a functionalist argument in support of the status-quo. We cannot easily know the extent to which the functional qualities of the system outweigh the dysfunctions. This requires comparative analysis with alternative consumption regimes and user communities. It will invariably be context- and perspective dependent (Ahrne et al., 2015; Geiger et al., 2012). And explicating these ideas, as scholars tend to say, requires further research. But we might speculate that what we see in the legitimization of MP3 and downloading is a variant of a ‘narcotizing dysfunction’ (Lazarsfeld and Merton, 1948/2002). In its original version this centred on the fact that we can have considerable amounts of information about the political system, but end up being apathetic. In our case, legitimization and legality might be providing pleasure at the same time as they ‘narcotize’, foreclosing alternative consumption regimes and delimiting the way we conceptualise the market and our place within it.

Conclusion

In this paper we have provided an account of the formation, legitimization tactics and legal sanction for MP3s as a consumer choice option. Scholarship within the domain of S-D Logic has championed the idea that value is manifested in the collective enactment of practices among a range of actors (Akaka and Vargo, 2015). Our work shows that this needs to be qualified. Not all collectively enacted practices such as peer-to-peer sharing will acquire sufficient legitimacy to permit them to enter co-creative interactions. Their value is effectively denied sanction before it enters the marketing system (cf. Grönroos, 2012). Only certain practices are rendered legitimate methods for facilitating the co-creation of value and

here the role of the legal system is paramount. Reflecting these points, our genealogy addressed the need for work to further our understanding of how consumption patterns emerge and are structured at the macro (political-economic-legal), meso (corporate) and micro (individual articulations before they cohere) level of practices (Brei and Tadajewski, 2015; Edvardsson et al., 2014; Giesler, 2008; Humphreys, 2010a; Prior, forthcoming).

We have made a number of contributions. Our study provides insight into the production of knowledge and the constitution of the boundaries of discursive formation regarding how goods are to be accessed, used, transformed, exchanged and divested. This level of structuring effectively frames ‘correct’ consumption. We focused on the power inflected processes and historical contingencies leading to the structuring of the field of action that constituted the consumption domain of MP3 as legitimate consumer choice options. We have shown how the structuring of consumption patterns are enacted in courts of law that have effects, not simply over taste, but on how goods are accessed, used, transformed and exchanged. These practices cut to the core of marketing theory (Akaka and Vargo, 2015; Chandler and Vargo, 2011; Vargo and Akaka, 2012), the way we understand processes of value constitution (Giesler et al., 2012), our conceptualisation of consumption as a ‘choice’ (Atik and Firat, 2013) and the consumer as sovereign (Geiger et al., 2012).

In this case, consumption choices are channelled and sovereignty is seriously restricted. This is an argument that has received very little attention to date, but which promises to make further inroads into our conceptual architecture. The centrality of practices as mechanisms for value creation accorded by both managerially orientated CCT literature and S-D Logic should invite, not preclude, a more politically or power sensitive intervention. We hope that our

paper has provided a stimulus to forward an understanding of politically embedded value co-creation.

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